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Supreme Court, U.S.
FILED

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NO. OFFICE OF THE CLERK

IN THE SUPREME COURT
OF THE
UNITED STATES OF AMERICA

October 1997 Term

Harvey F. Burge, Linda Sanders fka Linda Burge
and Marjorie C. Sanders
Petitioners

v

Paul C. Behr and Bonnie Burke-Behr
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO
Court of Appeals, State of Colorado

PETITION FOR A WRIT OF CERTIORARI

Harvey F. Burge, *pro se*
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57 pp

QUESTION PRESENTED

Colorado has held that the language of 26 USC 6335 and 26 USC 6339, [federal tax statutes controlling the sale of seized property through auction], conveys property title rather than just equity interest. This interpretation makes an administrative sale equivalent to a judicial foreclosure, precluding the taxpayer the right to a subsequent state judicial foreclosure on either the federal tax deed, or any superior deed of trust.

The question presented is whether this scheme is constitutional under the Due Process Clause of the Fifth and Fourteenth Amendments and whether it conflicts with the limitations of federal powers to convey property titles within the states, a power which was heretofore exclusively reserved for the states through the 10th Amendment.

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TABLE OF AUTHORITIES

Constitution for the United States of America:

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In The

Supreme Court of the United States

October Term, 1997

Harvey F. Burge
Linda Sanders fka Linda Burge and
Marjorie C. Sanders

Petitioners

vs

Paul C. Behr and Bonnie Burge Behr

Respondents

Petition for a Writ of Certiorari to the Colorado Court of Appeals

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PETITION FOR A WRIT OF CERTIORARI

Harvey F. Burge, Linda Sanders and Marjorie Sanders respectfully petition for a writ of certiorari to review the judgment of the Colorado Court of Appeals.

OPINIONS BELOW

The opinion of the Colorado Court of Appeals is reported in the Pacific Reporter, cited as Behr v Burge, 940 P. 2d 1084 (Colo.App. 1996). The opinion of the

Jefferson County District Court is not reported.

STATEMENT OF JURISDICTION

The Colorado Court of Appeals entered its decision on December 12, 1996. A Petition for Rehearing was denied on January 16, 1997. The Supreme Court of Colorado denied discretionary review on August 7, 1997. The jurisdiction of this court is invoked under 28 USC 1257(a). The Notice of Constitutional Questions was served below upon the Colorado Attorney General's Office on May 20, 1997 by the Colorado Supreme Court pursuant to Colorado Appellate Rule 44. Notice pursuant to 28 USC 2403 is applicable.

STATUTORY and CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution for the United States of America provides in pertinent part:

> "No person shall be ... deprived of life, liberty or property without due process of law..."

The Fourteenth Amendment to the Constitution for the United States of America provides in pertinent part:

> "No state shall ... deprive any persons of life, liberty or property without due process of law."

Article I Section 10 of the Constitution states:

> "No State shall...make any law impairing the

Obligation of contracts...."

Article IV Section 1 of the Constitution states:

"Full Faith and Credit shall be given in each State to the Public Acts, Records and judicial Proceedings of every other States."

26 USC 6339(b) states in pertinent part:

(b) Deed of Real Property. - In the case of the sale of real property pursuant to section 6335 -

(1) Deed as Evidence. - The deed of sale given pursuant to section 6338 shall be prima facie evidence of the facts therein stated; and

(2) Deed as Conveyance of Title. - If the proceedings of the Secretary as set forth have been substantially in accordance with the provisions of law, such deed shall be considered and operate as a conveyance of all the right, title and interest the party delinquent had in and to the real property thus sold at the time the lien of the United States attached thereto.

Colorado Revised Statutes, 13-40-104:

See Appendix F.

STATEMENT OF THE CASE

The Questions Raised Below:

This petition raises a fundamental question concerning the power of the federal government, through its agency the Internal Revenue Service, to convey property title without judicial supervision or through the state foreclosure procedure. The federal questions were raised in the trial court proceedings, on page 2 of the Petitioners/Defendants' Answer and Counterclaim, and during the first hearing, recorded in the January 25, 1995 transcript, at page 10. The Petitioner's continually asserted that the trial court had no subject matter jurisdiction to entertain an eviction hearing absent a prior foreclosure. The Court held that an eviction hearing was the proper forum at which to address the question of title rights affected by a challenged federal tax deed. After post trial motions for reconsideration were denied, Petitioners' appealed. The Petitioner's Opening Brief on appeal again challenged the court's subject matter jurisdiction, also asserting that the 90 minute eviction hearing had deprived them of a full and fair adjudication, and deprived of the required evidence [as limited to the *written* record, 26 USC 6340, rather than verbal testimony of the IRS Agent involved], Opening Brief at page 2, "Issues for Review". The Court of Appeals affirmed the lower Court's denial of such challenge. The Petitioner's continued to focus on the challenge of jurisdiction and challenged the Constitutionality of the proceedings, through to a Motion to Reconsider filed with the Colorado Court of Appeals, at pages 3 through 6. The Court, having answered these challenges, denied reconsideration. The court firmly held that a federal administrative tax sale under 26 USC 6335 is equivalent to state foreclosure law, regardless of the fact that it is not a judicial procedure, Order at Appendix A7, to wit:

> "We reject defendants' contention that the trial court erred in granting immediate possession of the property to the plaintiffs because defendants' eviction was not preceded by an action to foreclose upon a tax lien....

and at Appendix A8:

> "[a director's deed] is not an instrument used to secure the payment of an obligation that affects the title or an interest in real property....We therefore conclude that a Director's Deed is not a lien that must be foreclosed upon in order for plaintiffs to assert their ownership rights.."

The Petitioner's objected to this finding in a Motion for Reconsideration, asserting that a Federal Tax Deed is in fact, a negotiable instrument, and therefore, subject to foreclosure.

Further, at Appendix A11, the Order states:

> "The federal statutory scheme is similar to that provided by CRS 38-39-110" [State foreclosure];

and therefore, an administrative sale is equal to state law as regards title conveyance. Additionally, the Order states at Appendix A12,

> "Defendants' contention that the trial court committed error in cancelling the March quiet title hearing is without merit,"

determining that an eviction hearing was adequate, even

though the experts identified in the Pre Trial Memorandum had not yet testified. This resulted in an IRS Agent's verbal testimony, which contradicted the written record, to take precedence over the written record, contrary to the statutory requirement of 26 USC 6340, (infra page 7).

Chronology of Events:

The Petitioners' residence was sold at an IRS auction for unpaid income taxes and the Petitioners refused to redeem, and thereby ratify the sale, during the 180 days allowed by 26 USC 6337, alleging procedural defects and statutory violations on the part of the IRS. When the 180 day redemption time expired, the Respondents acquired a Director's Quit Claim Deed to the property. With this prima facie evidence of title, the Respondents immediately applied to the State District Court for an eviction order to dispossess the occupants of the home, Petitioner Linda Sanders and children. Petitioner Sanders was summoned to appear at an eviction hearing scheduled for January 25, 1995 and simultaneously served to appear for a trial to Quiet Title scheduled later, for March 21, 22, 23 1995. At the eviction hearing, Petitioners Burge/Sanders motioned to dismiss, asserting that the court had no subject matter jurisdiction to conduct an eviction hearing, absent a prior court decree from either a quiet title action, or a foreclosure action executed either under federal law, [26 USC 7403] or state law [Colorado Title 38] on either the federal tax deed, or the superior mortgage. Petitioners Burge/Sanders' had answered the Complaint to Quiet Title by asserting counter claims, and allegations that the IRS Deed was defective and void due to non compliance with statutory procedure as evidenced by the record required

pursuant to 26 USC 6340[1].

The trial court denied the motion to dismiss and proceeded with the eviction hearing and determined possessory rights by taking testimony from the IRS Agent involved in the challenged sale. With this, the court determined that the IRS had conveyed the title, all possessory rights, and the right to the first deed of trust mortgage, through federal tax law. The court issued a Writ of Possession to the Respondents/Behrs. Petitioners motioned for a Stay of eviction pending appeal, the court denied the same, and the Respondents evicted the Sanders/Burge family on February 5, 1995. The house was left empty pending trial to quiet the title.

Five weeks later, a Pre-Trial Order was signed on March 14, 1995 in preparation of the Quiet Title Action. The mortgage company was specifically excluded from the proceedings, see Appendix B15 paragraph 2. On March 21, 1995 the parties appeared for trial, prepared with evidence and experts, but the court cancelled the trial as redundant, finding that the eviction hearing and dispossession of the occupants had served to dispose of the title questions. The final Order was signed on **March 31, 1995**. The Petitioner's appealed.

The next sequence of events is relevant to demonstrate the conflict in laws that was created by the

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[1] 26 USC 6340 provides that only the written record is evidence of the procedures employed, rather than verbal testimony from the agents involved.

Jefferson County District Court's new interpretation of property rights, as represented by an IRS Quit Claim Deed.

On **June 20, 1995** the mortgage company began foreclosure proceedings against the Burge/Sanders First Deed of Trust, for non payment, Jefferson County District Court Action No. 95 CV 1129, Division 7, notwithstanding the Burge/Sanders had already been evicted from the property. On August 5, 1995 Petitioner Burge went bankrupt and served the Public Trustee of Jefferson County the Automatic Stay on the foreclosure proceedings. On August 9, 1995 the Respondents/Behr prepared a Warranty Deed in their name, as the "new owners" of the property currently in foreclosure under the Burge name, and sold the house in a private transaction. The bankruptcy Court was then informed by the State Court Order, that the Burge/Sanders property was no longer an asset of the Burge estate. The bankruptcy was dismissed. Sanders/Burge filed an adversary proceeding to challenge this holding, however, the Bankruptcy Court held that the State Court Order was dispositive of the issue.

On December 12, 1996, the Colorado Court of Appeals upheld the lower court's ruling that a federal Quit Claim Deed, acquired through an administrative tax sale, is exempt from the foreclosure process, and represents "all right, title and interest" of the taxpayer's property, see Order, Appendix A7, at bottom of page. Petition for Rehearing was denied on January 16, 1997. A Petition for review a Notice of Constitutional Questions was timely filed to the Colorado Supreme Court on February 14, 1997, which Notice was forwarded to the Colorado Attorney General's Office on May 20, and acknowledged by the Attorney General's Office on June 4, 1997.

REASONS FOR GRANTING THE WRIT

I. The decision of the Colorado Court of Appeals conflicts with the Supreme Court's holding that conveyance of real property title is within the exclusive legislation of the states - not the Department of Treasury. It also conflicts with the holdings of the New Mexico Supreme Court, and the Oklahoma Supreme Court.

US v Fox, 94 US 315 at 320-321 holds that federal legislative power cannot invade the area of real property rights, see also US v Brosnan, 363 US 237 and Aquilino v US, 363 US 509. Those legislative powers not specifically delegated to the federal government through Article I Sections 8 and 9 are reserved to the states through the 10th Amendment. While the federal government has power to *acquire an interest* in property through tax collection laws, the federal government has no legislative powers to *convey real property title* within the states. Involuntary property conveyance must take place through the courts - not through IRS administrative procedure.

This begs the question: What does an IRS Director's Deed represent - the **lien** interest which was sold, or the **title** to the property? The Colorado Court of Appeals referred to the IRS deed as a "lien" [Appendix A7 middle of page], yet refused to subject it to Colorado foreclosure law, which requires that "all liens" be foreclosed, CRS 38-35-117; CRS 38-38-701, infra.

This issue was only touched on in US v National Bank of Commerce, 472 US 713, 731 whereby the court explained that property can be sold for taxes under either 26 USC 6335 or 26 USC 7403. The former is non

judicial, the latter is under the supervision of a federal court within the district where the property is located. This Court suggested that if 6335 is chosen, then the instrument is subject to subsequent judicial process. Is this because the instrument issued after an administrative sale is not representative of a title - it's a lien? For that reason the language of the statute is limiting, and conveys only those rights which the taxpayer had, which does not include the right to violate State title conveyance laws, nor the terms of the mortgage contract which requires foreclosure in the event of default. The rights of the taxpayer must be determined in a foreclosure procedure. The procedures provided by law are 28 USC 2001, 26 USC 7403 at the federal level and CRS 38-39-101, 102; CRS 38-38-701 (1)(b) and (3) at the state level.

However, the Colorado courts have interpreted a tax auction under 26 USC 6335 as having the power to convey private property title, when no such power has been granted to Congress by the Constitution.

If it can be construed that the "subsequent judicial proceeding" required by due process prior to property taking is satisfied by an eviction hearing, then Colorado's holding conflicts with the New Mexico Supreme Court's holding, in Wal-Go Asso. v Leon, 624 P. 2d 507, 95 NM 565 and the Oklahoma Supreme Court's holding in Ferguson v Dist. Court of Oklahoma, 544 P. 2d 498. These courts stated, "An action for forcible entry or unlawful detainer is summary and does not settle issues of title or absolute right of possession between parties" and "the legal sufficiency of a defendant's claim could not be determined in forcible entry and detainer action".

Such conflict between Colorado's application of Forced Entry and Detainer, with New Mexico and the Oklahoma Supreme Courts should be resolved by this Supreme Court. Does 26 USC 6335 substitute for a full and fair foreclosure? Does an abbreviated eviction hearing substitute for a foreclosure and trial, or, conversely, does it simply serve to suppress evidence?

II. The Colorado Court of Appeals has given 26 USC 6335 an unconstitutional interpretation which has affected the constitutionality of Colorado eviction law.

The Colorado Courts have held that the language of 26 USC 6339 [cited on page 3 herein] provides that a Director's Deed conveys "all right, title and interest" that the delinquent taxpayer had to the property, if the taxpayer fails to redeem the property, see Order, Appendix A7.

This interpretation now ***requires*** the taxpayer to redeem a procedurally defective federal administrative sale, and waive his right to due process. That due process was heretofore provided by a subsequent judicial foreclosure process.

In that the language of the statute is conditional, to wit: "IF the proceedings of the Secretary have been in accordance with law..." it stands to reason that those proceedings should be subject to scrutiny through state foreclosure law, if the federal foreclosure process was not employed[2] or trial to quiet title. Now, the Colorado

[2] Federal foreclosure is provided by 28 USC 2001 or 26 USC 7403.

courts have exempted an IRS Director's Deed from all such process, stating that since such deed is "not an obligation" it is not subject to state foreclosure, see Appendix A8 at top of page. Further, the new interpretation assumes that the superior deed of trust is an additional "right" or "interest" of the taxpayers' which is also conveyed by the Director's Deed, which permits the investor possessory rights, to sleep in the taxpayer's bed as soon as the federal redemption period is expired, 26 USC 6337, UNLESS the taxpayer redeems an illegal sale. Now, the investor may evict the taxpayer prior to foreclosure of the outstanding superior mortgage. For that reason, the Colorado Court of Appeals upheld the implementation of Colorado's Forced Entry and Detainer statute to evict the Petitioners without requiring a court decree from a prior foreclosure, as specified by the eviction statute[3]. No longer is a Federal Marshall's Deed, a Sheriff's Deed or a Public Trustee's Deed required in order to assert possessory rights. However, this interpretation resulted in absurdity, in that the mortgage company began foreclosure in the taxpayers' name as required by Paragraph 21 of the mortgage contract, *after* the taxpayers had already been evicted.

Clearly, this interpretation presumes that federal tax law can interfere with mortgage contracts, state property conveyance laws, and state eviction laws, which cannot be the intent of Congress as it violates Article I Section 10 of

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[3] CRS 13-40-104, (Appdx. F) required either a breached lease agreement between the parties, or an illegal entry, or a foreclosure decree before it could be implemented. Now it may be implemented by acquisition of an IRS Deed.

the Constitution, to wit: "No state shall...pass any law...impairing the Obligation of Contracts..."

III. The new interpretation threatens mortgage lenders and title insurance companies because it substitutes the taxpayers's name on the Deed and the Deed of Trust for that of the investor's, without judicial process and therefore, without accurate public recording, in violation of Art IV Sec. 1 of the Constitution.

Article IV Sec 1 of the Constitution provides:

"Full faith and credit shall be given in each State to the Public Acts, Records and judicial Proceedings of every other state...".

The public record in Jefferson County Colorado shows that a foreclosure on the Burge/Sanders Deed of Trust was begun by FBS Mortgage on June 30, 1995 and withdrawn in August, 1995. Because the foreclosure was never finalized, the record does not reflect that the Burge/Sanders Deed of Trust was ever released or conveyed through the public trustee as required by Colorado foreclosure law[4], Appendix E. This forces a

[4] CRS 38-35-117, "Mortgages, trust deeds or other instruments intended to secure the payment of an obligation affecting title to or an interest in real property shall not be deemed a conveyance regardless of its terms, so as to enable the owner of the obligation secured to recover possession of real property without foreclosure and sale, but the same shall be deemed a lien."

violation of CRS 38-39-102(1)(a) which requires that a mortgage lien be released only "upon compliance with the provisions of such deed of trust".

Interpreting the IRS Director's Deed as representative of the taxpayer's possessory rights in the mortgage and first Deed of Trust, precluding the need to foreclose upon the same, is a interference with contracts in violation of Article I Section 10, which precludes the states from making any "Law impairing the Obligations of Contracts". Paragraph 21 of the mortgage contract requires liquidation through foreclosure for breach. However, the Colorado Court decision has circumvented this contract provision, and permitted the investor to be replaced as "the new owner" on the Deed of Trust, without conveyance through foreclosure. This again, confounds the public record because the Burge/Sanders name was never released from the Deed of Trust through foreclosure, pursuant to Paragraph 21 of the mortgage contract. Further, because the mortgage terms forbid assignment, the Title Insurance Company cannot presume that the deed of trust was voluntarily conveyed. Therefore, because the public record does not evidence any release of Burge/Sanders from the first deed of trust, it leaves the title insurance company in the dark as to that encumbrance. Regardless, even IF there was a release of the first Deed of Trust, because a good Samaritan paid it off, Colorado law states that such release would not result in a conveyance to the good Samaritan.[5] This result still causes a cloud on

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[5] CRS 38-39-102(a)(1) states: All instruments executed for the purpose of releasing any lien or encumbrance against real property shall be

the title for which the Title Insurance company would be liable.

Additionally, the Mortgage lender's collateral is compromised by this unsupervised conveyance of the first deed of trust mortgage because there is no requirement that the investor, who evicts the taxpayer, notify the lender. The investor, "as new owner", can make the payments until the market drops, and walk away from the depreciated property. Who then is liable for any deficiency on the collateral? Certainly the investor will say HE was not party to the mortgage, therefore, he has no legal obligation to pay any deficiency. The lender loses.

CONCLUSION

This new precedent, interpreting 26 USC 6335 as a complete foreclosure process, meeting the due process requirements prior to involuntary title conveyance, is dangerous to:

** Mortgage lenders, because the terms of the mortgage contract are interfered with, in that the investor, who was not approved by the lender, is substituted for the taxpayer on the Deed of Trust without their consent;

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considered only as discharging and cancelling such lien or encumbrance. No such release shall convey to any person, except the record owner of the property, any right, title or interest in the property. Words of conveyance used in any such release shall be construed only as provided in this section.

consequently, they cannot expect a deficiency judgment against the investor of the house who will assert that he didn't sign the mortgage agreement. [The evicted homeowner - if he can be found - will assert that his interest and liability represented by the Deed of Trust, was conveyed by this new interpretation of federal law.]

** Title Insurance companies because the public records do not reflect compliance with foreclosure law to effect a release of the Deed of Trust from the taxpayer's name. In effect, the property of the new owner/investor is still collateral for the taxpayer's debt - a circumstance fraught with potential litigation.

** Unsuspecting homeowners who currently suffer federal tax deeds on their properties since they can be evicted instantly if this Petition is not granted;

** Bankruptcy law is confounded, because creditors who expect to share an estate which is in foreclosure, will learn that they have been 'cut off' by this Colorado court interpretation of federal law, even if their interest was superior to the tax lien, such as in this case.

The new interpretation of 26 USC 6335 violates the 5th, 14th Amendments, Article I ¶10 and Article IV ¶1.

The Writ should be granted to address the foregoing issues.

Respectfully submitted:

Harvey F. Burge; Marjorie C. Sanders; Linda Sanders

COLORADO COURT OF APPEALS December 12, 1996
No. 95CA0752

Paul C. Behr and Bonnie Burke-Behr,
Plaintiffs-Appellees,

v

Harvey F. Burge, Linda H. Burge n/k/a
Linda Sanders, and Marjorie Sanders,
Defendants-Appellants.

Appeal from the District Court of
Jefferson County
Honorable Gaspar F. Perricone, Judge
No. 94CV1928

Division I
Opinion by
JUDGE HUME
Metzger and Roy,
JJ., concur

JUDGMENT AFFIRMED IN PART,
REVERSED IN PART AND CAUSE
REMANDED WITH DIRECTIONS

Arckey & Reha, L.L.C., John F. Reha, Littleton, Colorado, for Plaintiffs-Appellees

Declan J. O'Donnell, Englewood, Colorado, for Defendants-Appellants

Defendants, Harvey F. Burge, Linda H. Burge, n/k/a Linda Sanders, and Marjorie Sanders, appeal the trial court's judgments quieting title in certain real property to plaintiffs, Paul C. Behr and Bonnie Burke-Behr, granting them immediate possession thereof, and awarding them damages. We affirm in part, reverse in part, and remand with directions.

On September 3, 1992, the Internal Revenue Service (IRS) filed a Notice of Federal Tax Lien on defendants' home for unpaid taxes. The house was sold to plaintiffs at an IRS tax sale on March 28, 1994. After the redemption period expired, a Director's Deed was issued to plaintiffs.

Defendant Linda Sanders refused to leave the home when plaintiffs made a written demand upon her to vacate. Plaintiffs then filed a complaint under the Forcible Entry and Detainer Act, ¶13-40-101, et seq., C.R.S. (1987 Repl. Vol. 6A) (F.E.D.) to determine possession of the property and to quiet title pursuant to C.R.C.P. 105.

The trial court, finding substantial compliance with IRS provisions in conducting a tax seizure sale and issuing a Director's Deed, granted immediate possession to plaintiffs and set a date for a hearing to quiet title. Linda Sanders was evicted from the house on February 6, 1995.

On March 21, 1995, following a hearing, the court quieted title to the property in plaintiffs, awarded back rent for the time Linda Sanders occupied the house unlawfully, and assessed attorney fees against Sanders and Harvey Burge for asserting and maintaining frivolous, groundless, and vexatious defenses.

Initially, we note that the parties entered into a set of stipulations as to facts and issues relating to the tax sale. Further, plaintiffs argue that only three of the stipulated issues have been preserved for appeal by defendants and, as a result, only those issues should now be addressed. We agree, and decline to address other issues raised by defendants for the first time on appeal. See First National Bank v Union Tavern Corp., 794 P. 2d 261 (Colo. App. 1990).

I.

Defendants first contend that the trial court erred in granting immediate possession of the property and later quieting title to it in plaintiffs because, by virtue of procedural irregularities, the IRS tax seizure and subsequent sale of defendants' house were void. We disagree.

Federal law applies in determining the validity of a tax sale and state law applies in determining the validity of the execution of a deed resulting from such sale. Burgos Fuentes v United States, 14 Cl. Ct. 157 (1987).

The validity of a tax seizure sale and the subsequent transfer of land depends on whether the delinquent party has adequate notice of the sale under 26 U.S.C. ¶6335(b) (1994); VanSkiver v United States, 751 F. Supp. 1522 (D. Kan. 1990), and whether the IRS has substantially complied with 26 U.S.C. ¶6335 & 6337-39 (1994). See Silver Bell Industries, Inc. v. United States, 74-2 U.S.T.C. ¶9691 (D. Colo. 1974) (compliance with letter and spirit of law validates sale). A deed of sale given pursuant to 26 U.S.C. ¶6338 (1994) is prima facie evidence that a tax sale

complied with statutory regulations.

A.

Defendants first assert that the tax sale is void because no proper authorization existed for conducting it in a county other than the one in which the property was located. We are not persuaded.

According to 26 U.S.C. ¶6335(d) (1994), a tax sale is to be conducted within the county in which the property is seized except by special order of the Secretary. 26 C.F.R. ¶301.6335-1(c)(1) (1996) provides that a district director may order that the sale be held outside such county if it appears that a substantially higher bid may be obtained in another place, and IRS regulations allow that authority to be redelegated to IRS local group managers.

Here, testimony was presented that, although the form setting the time and place of the tax sale outside the county in which the seizure occurred was not signed by the IRS group manager, such place was+ set with the approval and authority of the group manager. In addition, the group manager signed documents relating to the sale, thus establishing her knowledge and approval of the site selected for the sale. Accordingly, proper delegation existed to allow the tax sale location to be changed. Cf. Johnson v Gartlan, 470 F. 2d 1104 (4th Cir. 1973) (authority not properly delegated when agent, acting alone, made decision to move location of tax sale); see also Long v Pippin, 914 P. 2d 529 (Colo. App. 1996).

Defendants further argue that the tax sale is void because the IRS failed to have the seized property

appraised under 26 U.S.C. ¶6334(b) (1994). This contention is without merit.

Section 6334(b) provides for an independent appraisal of exempt property when a taxpayer request such appraisal. A principal residence is not exempt property under ¶6334(b) if the levy of the residence is approved in writing by a district director or assistant district director of the IRS. See 26 U.S.C. ¶6334(e)(1) (1994).

Here, the levy on defendants' house was expressly approved. Therefore, the appraisal procedure of 26 U.S.C. ¶6334(1994) is not applicable.

Further, the preparation of a minimum bid for the sale of seized property provides a process for protesting such bid. Although defendant Linda Sanders objected to the valuation, she did not avail herself of the opportunity to request another appraisal as provided by the express language in the minimum bid worksheet given to defendants. Therefore, defendants have no grounds upon which further to protest the appraisal process followed by the IRS.

C.

Defendants' contention that the tax sale is void because of the IRS' use of two seizure numbers on paperwork pertaining to the seizure and sale of the property rests upon their argument that they were not afforded proper notice of the tax sale. We reject this contention.

Defendants had full knowledge of the time and place of the sale. Indeed, defendant Linda Sanders was present

at the tax sale. Defendants have not shown that the required notice was not provided to them, and thus, they have not shown that the use of two seizure numbers violated any of the statutory requirements for a valid sale.

D.

Alternatively, a taxpayer may ratify an IRS tax seizure sale and waive any objection he or she may have to irregularities in such sale by accepting and cashing an IRS surplus proceeds check. Johnson v Gartlan, supra.

Here, Linda Sanders admits cashing the IRS surplus proceeds check two days after the trial court's ruling in the quiet title proceeding and disbursing the proceeds to pay off other debts, despite having previously acknowledged that by doing so she would be deemed to have ratified the sale. Nevertheless, she asserts that her action could not ratify the tax sale because she did not apply for the proceeds, there was no explanation included with the check from which she could have determined its purpose, and she cashed it after judgment had been entered against defendants. We are not persuaded.

The court in Johnson v Gartlan, supra, determined that no explanation need be included with a surplus proceeds check, finding that it was unreasonable that a taxpayer would not know, or least question, the purpose of receiving such a check and concluding, therefore, that such check was cashed with knowledge of its purpose.

Further, defendants are mistaken in asserting that there needed to be an application for surplus funds. Application for such funds is required only by parties other

than the taxpayer who might have a claim to those funds. See 26 U.S.C. ¶6342(b) (1994).

Defendants rely solely on Johnson v Gartlan, supra, for their claim that they could ratify the tax sale only before any litigation began. However, the Johnson court, in determining that a tax sale was ratified by the cashing of a surplus proceeds check, did not hold that ratification can occur only before litigation begins.

Accordingly, by cashing the check, defendants have ratified the tax sale and any irregularity in the sales procedure is now deemed waived. See Lawrence v Beaman, 90-2 U.S.T.C. ¶50,514 (D. Mass. 1990) (tax sale ratified by part's prior knowledge of sale and informed acceptance of surplus proceed check).

II.

We reject defendants' contention that the trial court erred in granting immediate possession of the property to plaintiffs because defendants' subsequent eviction was not preceded by an action to foreclose upon a tax lien.

Plaintiffs demanded immediate possession of the property pursuant to ¶¶13-40-106 & 13-40-110, C.R.S. (1987 Repl. Vol. 6a). However, defendants claim that the Director's Deed issued to plaintiffs is a lien according to ¶38-35-117, C.R.S. (1982 Repl. Vol. 16A) and, therefore, must first be foreclosed upon according to ¶38-39-101 et seq., C.R.S. (1982 Repl. Vol. 16A). We disagree.

According to 26 U.S.C. ¶6339 (1994), a Director's Deed transfers to the purchaser of property "all right, title,

and interest of the party delinquent in and to the property sold." Such deed vests full ownership and possessory rights in the purchasing party and is not an instrument used to secure the payment of an obligation that affects the title or an interest in real property. Thus, such a deed is not an instrument intended to secure payment of an obligation as contemplated by ¶38-35-117.

We therefore conclude that a Director's Deed is not a lien that must be foreclosed upon in order for plaintiffs to assert their ownership rights. Accordingly, the trial court did not err in granting immediate possession of the property to plaintiffs as the true owners.

III.

Defendants further contend that the service of notice provided to them under an F.E.D. proceeding was not proper and, as a result, the trial court should have dismissed plaintiffs' complaint. We disagree.

According to ¶¶13-40-111 & 13-40-112, C.R.S. (1987 Repl. Vol. 6A), upon the filing of a complaint for F.E.D., a summons is to be issued to a defendant to appear before the court not less than five nor more than 10 days from the date of the summons. However, actual appearance cures a defective summons and service. Tyler v McKenzie, 43 Colo. 233, 95 P. 943 (1908). Further, if an unsuccessful party to an F.E.D. action takes an appeal from a judgment, then that party waives all irregularities in the summons and service thereof. Fort v Demmer, 91 Colo. 285, 14 P. 2d 489 (1932).

Here, the complaint was filed on October 18, 1994,

and a hearing was set for January 25, 1995. Defendants appeared at all proceedings and have brought this appeal. Thus, by their actions, they have waived any irregularities that might have existed in the summons and service.

IV.

Defendants next contend that the trial court erred in not allowing their expert witness to testify at the March quiet title hearing in support of Marjorie Sanders' assertion that her lien, filed after the Notice of Federal Tax Lien was recorded but before the Director's Deed was issued and recorded, was valid because IRS procedures were not followed in conducting the tax sale. This contention is without merit.

Here, the trial court had heard testimony on the issue of whether the IRS sale was valid and had ruled on that issue on two previous occasions. Defendants chose not to call any witnesses at those prior hearings. Thus, the testimony of defendants' expert witness was no longer relevant, and the trial court did not err in refusing to hear it.

Further, according to 26 U.S.C. ¶6339(c) (1994), the delivery of a Director's Deed by the IRS, as a matter of law, discharges the property named in the deed from any claim, interest, lien, or encumbrance that is recorded after the time the notice of federal tax lien is recorded.

The notice of federal tax lien was recorded on September 3, 1992. Marjorie Sanders' lien had no effect on the validity or enforceability of the earlier recorded tax lien. See Summer v Allison, 127 Ga. App. 217, 193 S.E.

2d 177 (1972) (garnishment proceedings on a note, established between levy seizure and service of notice of lien by IRS and subsequent sale of the note, afforded no intervening lien).

V.

Defendants also contend that the trial court erred in ordering them to pay damages to plaintiffs for the rental value of the property from the time the tax lien was recorded until they were dispossessed on February 5, 1995. We agree.

The amount of damages a prevailing plaintiff may recover in an F.E.D. action is the reasonable rental value of the premises during the time the other party continued an unlawful detainer. Grombone v Krekel, 754 P. 2d 777 (Colo. App. 1988).

Here, the trial court, relying on 25 U.S.C. ¶6339(b)(2) (1994), determined that defendants' unlawful possession began on September 3, 1992, when the tax lien was recorded.

Section 6339(b)(2) provides:

> If the proceedings of the Secretary . . . have been substantially in accordance with the provisions of law, [a Director's] deed shall be considered and operate as a conveyance of all the right, title, and interest the party delinquent had in and to the real property thus sold at the time the lien of the United States attached thereto.

In our view, this statutory provision simply establishes the taxpayer's interest to which a federal tax lien attached as of the date notice is filed. Other liens or interests established subsequent to the date the IRS notice is filed are junior and subject to a properly perfected notice of tax lien. The Director's Deed relates back to the notice date only for the purpose of determining the interests to which the federal tax lien attaches.

The federal scheme provides a procedure for sale, issuance of a certificate of purchase, and a period of redemption in which the taxpayer may redeem the property. See 26 U.S.C. ¶¶6335, 6337, & 6338 (1994).

The attributes of ownership, including the right to possession of the property, remain vested in the delinquent taxpayer owner until the taxpayer's ownership interest is vested in another following sale, expiration of the owner's right of redemption, and the issuance of the Director's Deed.

The federal statutory scheme is similar to that provided by ¶38-39-110, C.R.S. (1982 Repl. Vol. 16A) which provides, in pertinent part, as follows:

> Upon the issuance and delivery of such deed, but not until then, title shall vest in the grantee and such title shall be free and clear of all liens and encumbrances recorded or filed subsequent to the recording or filing of the lien on which the sale referred to in this section was based.

Accordingly, damages for unlawful possession could

not begin to accrue at least until the execution and delivery of the Director's Deed.

VI.

Defendants' contention that the trial court committed error by cancelling the March quiet title hearing is without merit.

Our review of the record shows that on March 21, 1995, the trial court held a scheduled hearing for purposes of quieting title and that both parties were represented by counsel and availed themselves of the opportunity to present argument and call witnesses on their behalf. The defendants were not allowed at that hearing to retry the issue of the validity of the tax sale that had previously been fully litigated and ruled upon by the trial court does not mean that no hearing took place.

VII.

Defendants lastly contend that the trial court erred in entering an award for attorney fees for asserting a frivolous defense. We disagree.

According to ¶13-17-102(4), C.R.S. (1987 Repl. Vol. 6A), a trial court must assess attorney fees if it finds that an attorney's or party's defense of an action was substantially frivolous, groundless, or vexatious. The determination that an award of attorney fees based upon the assertion of a frivolous and groundless defense is warranted is discretionary with a trial court, and its decision will not be overturned on appeal if it is supported by the record. Travers v Rainey, 888 P.2d 372 (Colo. App. 1994).

Here, the trial court awarded attorney fees against defendants Harvey Burge and Linda Sanders after specifically finding that their defenses were substantially frivolous, groundless, and vexatious, and that certain defenses were interposed for the sole purposes of delay, harassment, and to cause plaintiffs to incur legal expenses. The court also found that Linda Sanders, even when proceeding without an attorney, clearly knew or should have known that the defenses asserted were substantially frivolous, groundless, or vexatious. See ¶13-17-102(6), C.R.S. (1987 Repl. Vol. 6A).

Our review of the record shows that sufficient evidence exists to support the trial court's determination, and thus, we will not disturb its ruling.

The judgment is affirmed in all respects except for the award of damages in favor of plaintiffs. The damage award based upon unlawful possession is reversed, and the cause is remanded for reconsideration of the issue of damages in light of the views expressed in this opinion.

JUDGE METZGER and JUDGE ROY concur.

DISTRICT COURT, JEFFERSON COUNTY, COLORADO
Case No. 94-CV-1928 Div. 2

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF JUDGMENT

PAUL C. BEHR AND BONNIE BURKE-BEHR,
Plaintiffs,

v.

HARVEY F. BURGE, LINDA H. BURGE n/k/a LINDA H. SANDERS, MARJORIE SANDERS, and All Unknown Persons Who Claim Any Interest In the Subject Matter of This Action,

Defendants.

THE COURT, being duly advised in the premises by the pleadings of the parties filed herein, statements of counsel, the various stipulations of the parties, and the testimony of various witnesses and presentation of various exhibits at the hearing on Plaintiffs' Motion for Possession and at trial, and otherwise, hereby enters its Findings of Fact, Conclusions of Law and Order of Judgment in the above matter, as follows:

I. CLAIMS PRESENTED

A. This case arises from a Complaint and an Amended

Complaint filed by Plaintiffs. In their Complaint and Amended Complaint, Plaintiffs assert the following claims:

1. A claim for quieting of title as against Defendants Harvey F. Burge and Linda H. Burge, now known as Linda H. Sanders, to a certain parcel of real property known as 11081 W. Rowland Drive, Littleton, Jefferson County, Colorado, 80127 (the "Property"). The legal description of the Property is:

> Lot 11, Block 4, The Meadows Filing No. 5, Amendment No. 1, County of Jefferson, State of Colorado.

2. A claim for possession as against such Defendants and anyone who claims a right of possession to the Property thereunder.. (This claim was decided in Plaintiffs' favor by the Court in its Order of Possession dated January 26, 1995.)

3. A claim for damages as against said Defendants for wrongful possession of the Property.

4. In their Amended Complaint, Plaintiffs added a claim for quieting of title as against Defendant Marjorie Sanders, who claims an interest in the Property by way of a certain Deed of Trust executed in her favor by Defendant Linda H. Sanders, dated May 16, 1994 and recorded May 18, 1994 with the Jefferson County Clerk and Recorder.

5. In addition, upon the Plaintiffs' request for attorney's fees included in their Response to Defendant Linda Sanders' Motion to Reconsider for Emergency Stay Pending Appeal filed herein on February 2, 1995, the

Court advised the parties that it would be considering such motion at the conclusion of the trial scheduled in this matter to commence March 21, 1995. Such request for attorney's fees was renewed on March 20, 1995, in Plaintiffs' Response to Defendant Linda Sanders and Harvey F. Burge's Motion for Damages. In their renewed request, Plaintiffs sought an award of attorney's fees against all three Defendants as well as against counsel for Defendants Linda H. Sanders and Harvey F. Burge.

II. FINDS OF FACT AND CONCLUSIONS OF LAW

The following Findings of Fact and Conclusions of Law are hereby made by the Court:

A. All findings and conclusions entered by way of the parties' stipulations, or made at or as a result of the hearing on Plaintiffs' Motion for Possession on January 25, 1995, as contained in the Court's Pre-Trial Order, are incorporated herein. A copy of such Pre-Trial Order is attached hereto and by this reference made a part hereof.

B. In addition to the Findings of Fact and Conclusions of Law contained in the Pre-Trial Order, the Court makes the following Findings and Conclusions:

1. Findings and Conclusions as to the Quiet Title Claim asserted by Plaintiffs as against Defendants, Harvey F. Burge and Linda H. Burge, n/k/a Linda H. Sanders.

a. Plaintiffs purchased the Property at an auction conducted by the Internal Revenue Service on March 28, 1994, pursuant to the IRS' power of seizure, 26

U.S.C. ¶6335, which was pursuant to a Notice of Federal Tax Lien dated August 3, 1992, which was recorded with the Jefferson County Clerk and Recorder on September 3, 1992.

b. Section 6338 of the Internal Revenue Code, 26 U.S.C. ¶6338, provides:

> CERTIFICATE OF SALE; DEED OF REAL PROPERTY.
>
> (a) Certificate of Sale. --In the case of property sold as provided in section 6335, the Secretary shall give to the purchaser a certificate of sale upon payment in full of the purchase price. In the case of real property, such certificate shall set forth the real property purchased, for whose taxes the same was sold, the name of the purchaser, purchaser, and the price paid therefor.
>
> (b) Deed to Real Property. --In the case of any real property sold as provided in section 6335 and not redeemed in the manner and within the time provided in section 6337, the Secretary shall execute (in accordance with the laws of the state in which such real property is situated pertaining to sales of real property under execution) to the purchaser of such real property at such sale, upon his surrender of the Certificate of Sale, a deed of the real property so purchased by him, reciting the facts set forth in the certificate.

c. Internal Revenue Code Section 6339, subsections (b) and (c), provide:

LEGAL EFFECT OF CERTIFICATE OF SALE OF PERSONAL PROPERTY AND DEED OF REAL PROPERTY.

(b) Deed of Real Property. --In the case of sale of real property pursuant to section 6335--

(1) Deed as evidence. --The deed of sale given pursuant to section 6338 shall be prima facie evidence of the facts therein stated; and

(2) Deed as conveyance of title. --If the proceedings of the Secretary as set forth have been substantially in accordance with the provisions of law, such deed shall be considered and operate as a conveyance of all the right, title, and interest the party delinquent had in and to the real property thus sold at the time the lien of the United States attached thereto.

(c) Effect of Junior Encumbrances. -- A certificate of sale of personal property given or a deed to real property executed pursuant to section 6338 shall discharge such property from all liens, encumbrances, and titles over which the lien of the United States with respect to which the levy was made had priority.

d. The process employed by the Internal Revenue Service was "substantially in accordance with the provisions of law," pursuant to 26 U.S.C. 6339(b)(2) and accordingly, under the provisions of such statute, all of the right, title, and interest which the Defendants Harvey F. Burge and Linda H. Burge, n/k/a Linda H. Sanders had in

and to the Property were lawfully conveyed to the Purchasers, effective September 3, 1992.

e. Conversely, by way of said sale, Defendants Harvey F. Burge and Linda H. Burge, n/k/a Linda H. Sanders, ceased to have any right, title or interest in the Property whatsoever, effective September 3, 1992.

f. Accordingly, title to the Property is fully and irrevocably quieted Plaintiffs, to the full exclusion of Defendants Harvey F. Burge and Linda H. Burge, n/k/a Linda H. Sanders.

2. Plaintiff' Quiet Title Claims as Against the Interest in the Property Claimed by Marjorie Sanders.

a. Marjorie Sanders was added as a party to this matter by way of the Plaintiffs' Amended Complaint, filed on March 14. Marjorie Sanders filed an Answer herein on March 15, appeared at the trial and stated under oath that it was her desire to proceed as a party at trial, without legal representation.

b. Marjorie Sanders claims an interest prior to that of the Plaintiffs, pursuant to a certain Deed of Trust executed in her favor by Defendant Linda Sanders, dated May 16, 1994.

c. Such Deed of Trust was recorded with the Jefferson County Clerk and Recorder on May 18, 1994.

d. Such Deed of Trust was for the purpose of securing the sum of $25,000 in antecedent advances of money by Marjorie Sanders to Defendant Linda Sanders

and/or Defendant Harvey Burge at various times during his marriage to Linda Sanders.

e. Marjorie Sanders is the mother of Defendant Linda Sanders.

f. Pursuant to the express language of Internal Revenue Code section 6339, 26 U.S.C. 6339, Marjorie Sanders' interest is non-effective as against the rights of Plaintiffs. Specifically, pursuant to ¶6339(c), the delivery by the Internal Revenue Service of the Director's Deed to Plaintiffs, as a matter of law, discharged the Property from any claim, interest, lien or encumbrance she may claim which may have been recorded at any time after the time of recordation of the Notice of Federal Tax Lien on September 3, 1992, including the Deed of Trust referred to herein.

g. Marjorie Sanders contends that she is nonetheless entitled to priority over the interests claims by the Plaintiffs in the Property, in that the Deed of Trust in her favor secures moneys which she loaned to Defendants Linda Sanders and/or Harvey F. Burge prior to the date of recordation of her Deed of Trust and to the extent that a debt of $2,000 was noted as being owed to her in a certain Stipulation and Settlement Agreement filed as part of a Dissolution of Marriage proceeding which was filed by Linda H. Burge n/k/a Linda H. Sanders against Harvey F. Burge and which was included in the record of such case, Jefferson County District Court No. 92-DR-3473.

h. Such contentions are without merit. It is irrelevant what time the debt(s) underlying such Deed of Trust may have been incurred. It is further irrelevant if

such debts would have been noted in a divorce proceeding, as such matters do not constitute matters of which the IRS or the Plaintiffs were required to take notice or of which the law puts them upon notice.

i. In addition, the Stipulation and Settlement Agreement were not recorded with the Jefferson County Clerk and Recorder. Moreover, said document was not filed with the Jefferson County Clerk of Court until April 5, 1993, which is after September 3, 1992, the date upon which the Notice of Federal Tax Lien was recorded. Accordingly, even if the Stipulation and Settlement Agreement did constitute a matter of which the Plaintiffs were legally required to take notice, any claim to priority tied to such document would, in any even, be junior to the Notice of Federal Tax Lien.

j. Accordingly, title to the Property is fully and irrevocably quieted in Plaintiffs as against Marjorie Sanders or any claim therein she may make.

3. Findings and Conclusions Regarding Plaintiffs' Claim for Damages for Withheld Possession.

a. Plaintiffs have asserted a claim against Defendants Harvey F. Burge and Linda H. Burge, n/k/a Linda H. Sanders for damages because of said Defendants' possession of the Property during the period when the Plaintiffs were legally entitled thereto.

b. Internal Revenue Code section ¶6339(b)(2) is dispositive of this issue. Its specific terms provide that in the event that the taxpayer does not redeem property sold under IRS Notice of Lien and seizure, the Director's Deed

thereto "shall operate as a conveyance of all the right, title and interest the party delinquent had in and to the real property thus sold at the time the lien of the United States attached thereto." Two specific concepts which are relevant to the instant issue are contained in the terms of ¶6339(b)(2). First, every aspect of real property ownership which would otherwise be possessed by the taxpayer is conveyed to the purchaser by operation of ¶6339(1)(2). One such aspect of real property ownership is the right to possess the property. The second concept contained in ¶6339(b)(2) is that the effective date of such transfer is the date the Notice of Tax Lien is filed (i.e. the date the tax lien "attaches" under ¶6339(b)(2)). Accordingly, neither the date upon which the IRS sale of the property occurs, the date the Certificate of Purchase is issued or recorded or the date upon which the Director's Deed is executed, delivered or recorded is relevant to such consideration.

c. Therefore, as a matter of law, effective September 3, 1992, the date upon which the Notice of Tax Lien was filed against the Property, the transfer of all rights to ownership are therefore entitled to an award of the reasonable rental value of the Property from September 3, 1992 through February 5, 1995, the date Plaintiffs, under this Court's Order of Possession, dispossessed Defendant Linda H. Sanders. Although this is a period of 29 months and three days, Plaintiffs have consented to computing this period as 29 months.

d. The parties have stipulated that the reasonable rental value of the Property at all times material hereto is $1850 per month. Accordingly, the gross amount of damages to which Plaintiffs are entitled for withheld possession is $53,650 ($1850 X 29).

e. As offsets against this sum, Plaintiffs have consented to have deducted the following amounts, which the Court finds reasonable:

i. Annual property taxes of $2,347.14 (which is the amount of property taxes for 1994, payable in 1995). This amount equates to $195.59 per month. Multiplied by 29 months, the amount of offset for property taxes is $5,672.26;

ii. Annual insurance premiums of $394 (the current premium for insurance which has been purchased by the Plaintiffs), which total $32.83 per month, which for 29 months equals $952,17; and

iii. Homeowners association dues of $29.00 per month, which totals $841 for 29 months.

This results in an offset of $7,465.43.

f. There is a first deed of trust loan against the property which is held by F.B.S. Mortgage, assignee of Bank Western, F.B.S., the originator thereof. The balance due on such loan as of the date of trial was approximately $69,785.50. The original balance due under the loan was $70,000. Plaintiffs have asserted that an offset in the amount of the $214.50 difference between these two sums should be applied against the amount due for withheld possession. Defendants Burge and Linda Sanders assert that they should be given credit on a monthly basis in the amount of $839, which approximates the monthly payments which they have made on such loan. The Court agrees that the offset should be in an amount of $24,331 ($839 x 29), as this amount represents payments which the Defendants

Burge and Linda Sanders have been making for possession of the Property.

g. From the above, the net amount due to Plaintiffs for withheld possession is $21,853.57 ($53,650 less $7,465.43, less $24,331).

4. Findings and Conclusions as to Plaintiffs' Request for Attorney's Fees.

a. In their Response to the Motion for Stay filed herein by Defendants Burge and Linda Sanders, Plaintiffs made a request for attorney fees under C.R.S. ¶13-17-101, et. seq. By way of its Order dated march 6, 1995, the Court advised the parties that it would take such request under advisement and would render its decision on such request at the conclusion of trial. Plaintiffs renewed such request in their Response to Defendants' Motion for Damages, filed shortly before trial commenced.

b. The standards for imposition of an award of attorneys fees are set forth in C.R.S. ¶13-17-102. That statute states, in appropriate part, as follows:

> Attorney fees. (1) Subject to the provisions of this section, any civil action of the nature commenced or appealed in any court of record in this state, the court may award, except as this article otherwise provides, as part of its judgment and in addition to any costs otherwise assessed, reasonable attorney fees.
>
> (2) Subject to the limitations set forth elsewhere in this article, in any civil action of any nature

commenced or appealed in any court of record in this state, the court shall award, by way of judgment or separate order, reasonable attorney fees against any attorney or party who has brought or defended in any civil action, either in whole in part, that the court determines lacked substantial justification.

(3) When a court determines that reasonable attorney fees should be assessed, it shall allocate the payment thereof among the offending attorneys and parties, jointly or severally, as it deems most just, and may charge such amount, or portion thereof, to any offending attorney or party.

(4) The court shall assess attorney fees if, upon the motion of any party or the court itself, it finds that an attorney or party brought or defended an action, or any part thereof, that lacked substantial justification or that the action, or any part thereof, was interposed for delay or harassment or if it finds that an attorney or party unnecessarily expanded the proceeding by other improper conduct...As used in this article, "lacked substantial justification" means substantially frivolous, substantially groundless, or substantially vexatious.

...(6) No party who is appearing without an attorney shall be assessed attorney fees unless the court finds that the party clearly knew or reasonably should have known that his action or defense, or any part thereof, was substantially frivolous, substantially groundless, or substantially vexatious...

c. The entirety of the defenses to the possession and quiet title aspects of Plaintiffs' claims against Defendants Burge and Linda H. Sanders were substantially frivolous, substantially groundless and substantially vexatious and said defenses were further interposed for the purpose of delay and/or harassment, all in violation of C.R.S. ¶13-17-102.

d. In addition, to the extent that C.R.S. ¶13-17-102(6) requires a more stringent standard for the recovery of attorneys fees against a party not appearing by an attorney, the Court concludes that Defendant Linda Sanders clearly knew or reasonably should have known that such defenses were substantially frivolous, substantially groundless, and substantially vexatious.

e. Pursuant to testimony given at trial by Defendant Linda Sanders, she was primarily responsible for the entirety of the defenses, arguments and assertions made by the Defendants prior to the appearance of defense counsel in this matter on January 31, 1995. In addition, Linda Sanders, by her own testimony, was approximately 50% responsible for the remainder of the assertions made by said Defendants in this case. None of the defenses to possession of title cited by Defendants Burge and Linda Sanders were based on a reasonable reading of the law, many were not supported by legal recitation whatsoever, and none were withdrawn in the face of clearly correct argument to the contrary by Plaintiffs. Furthermore, none of such defenses, arguments or assertions were made in good faith attempt to establish new theories of law in Colorado. In addition, Sanders conducted her defense in a manner calculated to cause as much legal fee expense as possible for the Plaintiffs, in an attempt to cause them to

refrain from pursuing their clear rights to title in this matter. Furthermore, Defendant Linda Sanders showed a significant degree of disrespect for the Court's orders, accused the Court and Plaintiffs' counsel with unethical conduct without any factual foundation or other good reason and in general repeatedly attempted to disrupt the orderly process of justice in this matter.

f. The defenses asserted by Defendants Burge and Linda Sanders as to the amount of Plaintiffs' damages for withheld possession and the defenses by all three Defendants as to the interest claimed in the Property by Marjorie Sanders were not violative of C.R.S. ¶13-17-101, et. seq. and no attorneys fees will be imposed for time devoted by Plaintiffs' attorney to defend against these arguments and defenses.

g. The imposition of the defenses to possession and title by Defendants Burge and Linda Sanders, as well as Linda Sanders' conduct as described above, entitles Plaintiffs to an award of attorney's fees against said Defendants in the amount shown by Plaintiffs' attorney's affidavit. No attorneys fees will be awarded as against Defendant Marjorie Sanders or against Defendants' counsel.

5. Findings and Conclusions as to Miscellaneous Matters.

a. No costs were incurred by Plaintiffs after the appearance of Defendant Marjorie Sanders as a party herein. Accordingly, costs shall be awarded pursuant to C.R.S. ¶¶13-16-164 and 122 against Defendants Harvey F. Burge and Linda H. Sanders, but not against Defendant

Marjorie Sanders, as shown in Plaintiffs' Bill of Costs.

III. JUDGMENT

In consideration of the foregoing, the Court hereby enters Judgment as follows:

1. Title to the Property is hereby irrevocably quieted in Plaintiffs Paul C. Behr and Bonnie Burke-Behr to the full exclusion of Defendants Harvey F. Burge, Linda H. Burge, now known as Linda H. Sanders, and Marjorie Sanders, as well against any party who claims an interest in the Property through such persons.

2. No declaration of quiet title is made as against any person, firm or other entity which is not a party to this matter, including the holder of the Promissory Note and Deed of Trust executed November 5, 1991, by Defendants Harvey F. Burge and Linda H. Burge, n/k/a Linda H Sanders, to the Order of Bank Western, F.S.B. and recorded with the Jefferson County Clerk and Recorder on November 19, 1991.

3. Plaintiffs are hereby awarded damages against Defendants Harvey F. Burge and Linda H. Sanders, jointly and severally in the amount of $21,853.57, for withheld possession.

4. Plaintiffs are awarded attorney fees against Defendants Harvey F. Burge and Linda H. Burge n/k/a Linda H. Sanders, jointly and severally, in an amount of $25,705.00.

5. Plaintiffs are awarded costs against Defendants

Harvey F. Burge and Linda H. Burge, n/k/a Linda H. Sanders, jointly and severally, in an amount of $415.00. No costs are awarded against Defendant Marjorie Sanders.

6. All amounts due under this Order of Judgment shall earn interest at a rate of eight percent (8%), compounded annually until paid, pursuant to C.R.S. ¶5-12-102(4)(a).

THE COURT

By:_____
Gaspar F. Perricone
Chief Judge

Judgment entered this 30th Day of March, 1995

SUPREME COURT, STATE OF COLORADO
CASE NO. 97SC126
CERTIORARI TO THE COLORADO COURT OF APPEALS, 95 CA 0752
DISTRICT COURT, JEFFERSON COUNTY 94CV1928

ORDER

HARVEY F. BURGE and LINDA BURGE, n/k/a LINDA SANDERS; and MARJORIE SANDERS,

Petitioners/Cross-Respondents,

v

PAUL C. BEHR and BONNIE BURKE-BEHR,

Respondents/Cross Petitioners.

Upon consideration of the Petition and Cross-Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the judgment of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition and Cross-Petition for Writ of Certiorari shall be, and same hereby are, DENIED.

BY THE COURT, EN BANC, AUGUST 4, 1997.

cc:

John F. Reha
ARCKEY & REHA, LLC
26 West Dry Creek Cir., #740
Littleton, CO 80120

Declan O'Donnell
6841 S. Yosemite St., #3-C
Englewood, CO 80112

Honorable Henry E. Nieto
Jefferson County District Court
Court Section, Suite 3030
100 Jefferson County Parkway
Golden, CO 80401-6002

Clerk of the District Court
Jefferson County District Court
Court Section, Suite 3030
100 Jefferson County Parkway
Golden, CO 80401-6002

Patrick H. Stanford, Clerk
Colorado Court of Appeals

SUPREME COURT, STATE OF COLORADO
Case No. 97SC126

NOTICE OF CONSTITUTIONAL QUESTIONS

Harvey F. Burge and Linda H. Burge n/k/a Linda Sanders
and
Marjorie Sanders
Defendants/Appellants/Petitioners

v

PAUL C. BEHR AND BONNIE BURKE-BEHR
Plaintiffs/Appellees/Respondents

COMES NOW, Appellants, by and through Declan O'Donnell, pursuant to C.A.R. Rule 44 and files this Notice of two Constitutional questions raised in the Petition for Review of the above captioned matter, and state as follows:

1. This appeal challenges the application of Colorado's Forced Entry and Detainer statute, CRS 13-40-101 et seq. The lower courts determined that the applications identified within said statute are not exclusive of other applications. CRS 13-40-104 limits application of said statute to the following prerequisites: in sections (a-b) unlawful entry, in sections (c-e) breach of rent/lease agreement (f) breached mortgage contract between the parties, and section (g-h) prior court decree from a foreclosure sale. In this case, the court determined that a 2 hour eviction hearing, *after*

implementation of the F-E-D statute, was proper without any of the prerequisites identified in CRS 13-40-104, because a Federal Tax Deed conveys "all right, title and interest" of the taxpayer to the investor upon expiration of the federal redemption period, pursuant to 26 USC 6339 and therefore, the taxpayer illegally occupies a house belonging to the investor and there is no right to a *prior* judicial procedure to determine property rights through either a federal or state foreclosure process, or a *prior* **trial** to Quiet Title. Appellants raise the following question: Is it a denial of due process, under the 5th and 14th Amendments to the Constitution for the United States of America and under Art. II, Sections 3, 6, 14 and 25 of the Constitution for Colorado to execute eviction under CRS 13-40-101 et seq. without one of the prerequisite conditions identified in CRS 13-40-104?

2. Appellants raise the second question: Is it a denial of due process, under the 5th and 14th Amendments to the Constitution for the United States of America and under Art. II, Sections 3, 6, 14 and 25 of the Constitution for Colorado to interpret 26 USC 6339 to be a conveyance of property rights of the taxpayer's superior deed on the property when the Constitution for the United States of America gives no legislative power to the federal government to convey rights to property within the States nor to interfere with the terms of [mortgage] contracts?

These arguments were raised in the pleadings below, and are specifically addressed in the Appellants (denied) Motion for Reconsideration, attached hereto.

Respectfully,

_____

Declan O'Donnell #4412
Attorney for Petitioners
6841 S. Yosemite
Englewood CO 80112
303-721-1177

Filed in the Colorado Supreme Court on February 14, 1997 simultaneously with a Petition for Writ of Certiorari, and served upon opposing Counsel. The Notice was served upon the Attorney General, State of Colorado by the Supreme Court Clerk on May 20, 1997.

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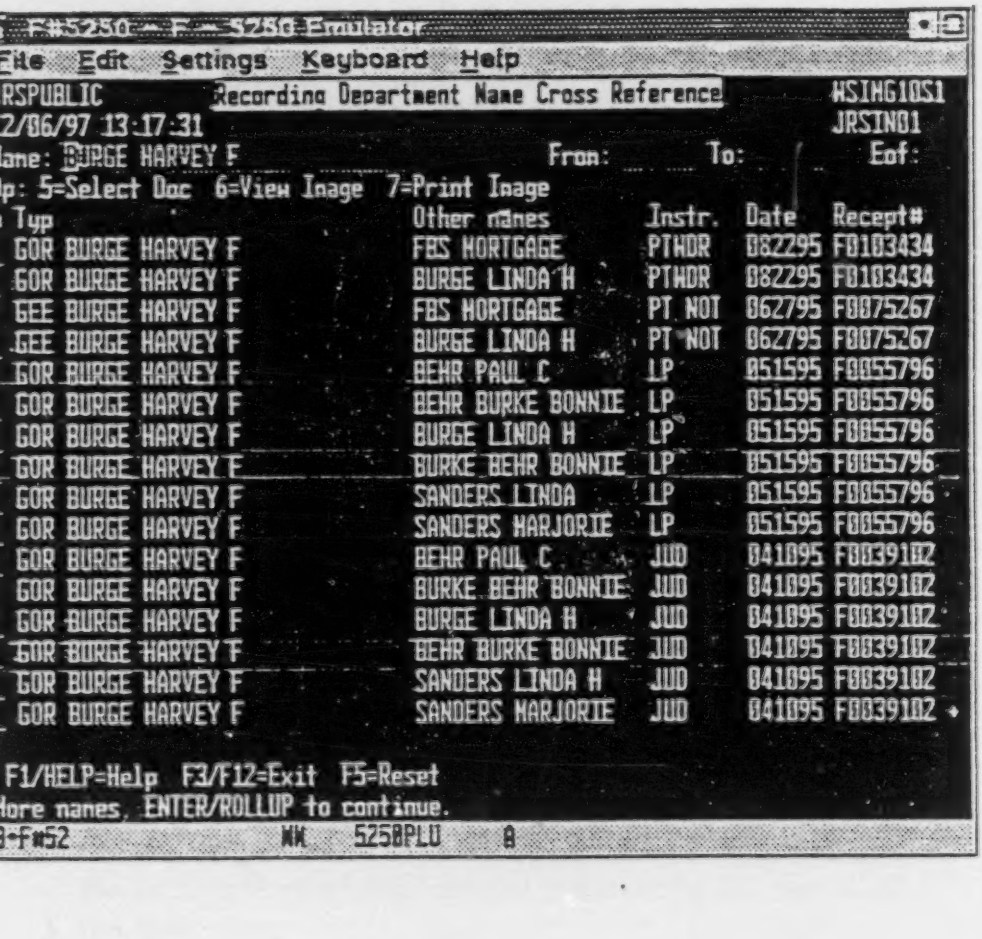
PUBIC RECORD, JEFFERSON COUNTY CLERK AND RECORDER'S OFFICE - Showing Public Trustee Notice of Foreclosure Sale published on June 27, 1995 and Withdrawn on August 22, 1995 without a release of the Deed of Trust, indicating that the Deed of Trust was redeemed by the grantor/borrower.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Typ Other names Instr. Date Recept#
GOR BURGE HARVEY F FBS MORTGAGE PTHDR 082295 F0103434
GOR BURGE HARVEY F BURGE LINDA H PTHDR 082295 F0103434
GEE BURGE HARVEY F FBS MORTGAGE PT NOT 062795 F0075267
GEE BURGE HARVEY F BURGE LINDA H PT NOT 062795 F0075267
GOR BURGE HARVEY F BEHR PAUL C LP 051595 F0055796
GOR BURGE HARVEY F BEHR BURKE BONNIE LP 051595 F0055796
GOR BURGE HARVEY F BURGE LINDA H LP 051595 F0055796
GOR BURGE HARVEY F BURKE BEHR BONNIE LP 051595 F0055796
GOR BURGE HARVEY F SANDERS LINDA LP 051595 F0055796
GOR BURGE HARVEY F SANDERS MARJORIE LP 051595 F0055796
GOR BURGE HARVEY F BEHR PAUL C JUD 041095 F0039102
GOR BURGE HARVEY F BURKE BEHR BONNIE JUD 041095 F0039102
GOR BURGE HARVEY F BURGE LINDA H JUD 041095 F0039102
GOR BURGE HARVEY F BEHR BURKE BONNIE JUD 041095 F0039102
GOR BURGE HARVEY F SANDERS LINDA H JUD 041095 F0039102
GOR BURGE HARVEY F SANDERS MARJORIE JUD 041095 F0039102
F1/HELP=Help F3/F12=Exit F5=Reset
More names, ENTER/ROLLUP to continue.
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Appendix E

COLORADO FORCED ENTRY AND DETAINER:

The following statute identifies the jurisdictional prerequisites for application of said statute:

CRS 13-40-104. Unlawful detention defined - exception.
(1) Any person is guilty of an unlawful detention of real property in the following cases:
(a) When entry is made, without right or title, into any vacant or unoccupied lands or tenements;
(b) When entry is made, wrongfully, into any public lands, tenements, mining claims, or other possessions which are claimed or held by a person who may have located, entered, or settled upon the same in conformity with the laws, rules, and regulations of the United States, or of this state, in relation thereto;
(c) When any lessee or tenant at will, or by sufferance, or for any part of a year, or for one or more years, of any real property, including a specific or undivided portion of a building or dwelling, holds over and continues in possession of the demised premises, or any portion thereof, after the expiration of the term for which the same were leased, or after such tenancy, at will or sufferance, has been terminated by either party, except as provided in subsection (2) of this section;
(d) When such tenant or lessee holds over without permission of his landlord after any default in the payment of rent pursuant to the agreement under which he hold, and three days' notice in writing has been duly served upon the tenant or lessee holding over, requiring in the alternative the payment of the rent or the possession of the premises. No such agreement shall contain a waiver by the tenant of the three days' notice requirement of this paragraph (d). It shall not be necessary, in order to work a forfeiture of

such agreement, for nonpayment of rent, to make a demand for such rent on the day on which the same becomes due; but a failure to pay such rent upon demand, when made, works a forfeiture;

(e) When such tenant or lessee holds over, without such permission, contrary to any other condition or covenant of the agreement under which he holds, and three days' notice in writing has been duly served upon such tenant or lessee requiring in the alternative the compliance with such condition or covenant or the delivery of the possession of the premises so held;

(f) When the property has been duly sold under any power of sale, contained in any mortgage or trust deed which was executed by such person, or any person under whom he claims by title subsequent to date of the recording of such mortgage or trust deed and the title under such sale has been duly perfected and the purchaser at such sale, or his assigns, has duly demanded the possession thereof, except as provided in section (2) of this section;

(g) When the property has been duly sold under the judgment or decree of any court of competent jurisdiction and the party or privies to such judgement or decree, after the expiration of the time of redemption when redemption is allowed by law, refuses or neglects to surrender possession thereof after demand therefor has been duly made by the purchaser at such sale, or his assigns, except as provided in subsection (2) of this section;

(h) When an heir or devisee continues in possession of any premises sold and conveyed by any personal representative with authority to sell, after demand therefor is duly made;

(i) When a vendee having obtained possession under an agreement to purchase lands or tenements, and having failed to comply with his agreement, withholds possession thereof from his vendor, or assigns, after demand therefor

is duly made.
(2) Repealed, L.87, p. 1356, ¶6, effective January 31, 1989.
(3) Repealed, L. 87, p. 1356, ¶6, effective July 1, 1991.